

STATE OF VERMONT  
VERMONT SUPREME COURT  
JULY TERM, 2017

**Order Promulgating Amendments of the Vermont Rules of Civil Procedure**

Pursuant to the Vermont Constitution, Chapter II, Section 37, and 12 V.S.A. § 1, it is hereby ordered:

1. That Rule 1 of the Vermont Rules of Civil Procedure be amended to read as follows (deleted matter struck through; new matter underlined):

**RULE 1. SCOPE OF RULES**

These rules govern the procedure in the Civil and Criminal Divisions of the Superior Court and in the Judicial Bureau in all suits of a civil nature whether cognizable as cases at law or in equity, including actions transferred to the Civil Division from the Criminal Division and appeals to the Civil and Criminal Divisions from any court, commission, board, agency, or department of the state or any political subdivision thereof, with the exceptions stated in specific rules and in Rule 81. They shall be construed, ~~and administered,~~ and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action.

**Reporter's Notes—2017 Amendment**

Rule 1 is amended to incorporate an amendment to F.R.C.P. 1 effective December 1, 2015. The amendment is intended to encourage increased cooperation among the parties by making clear that parties as well as courts have a responsibility to achieve “the just, speedy, and inexpensive determination of every action.” See Federal Advisory Committee’s Note to 2015 amendment of F.R.C.P. 1.

2. That Rule 26 of the Vermont Rules of Civil Procedure be amended to read as follows (deleted matter struck through; new matter underlined):

**RULE 26. GENERAL PROVISIONS REGARDING DISCOVERY**

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(b) **Discovery Scope and Limits.** ~~Unless otherwise limited by order of a superior judge in accordance with these rules, the scope of discovery is as follows:~~

~~(1) *In General; Limitations.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any~~

~~other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.~~

~~A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of this paragraph. The court may specify conditions for the discovery.~~

~~The frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by a Superior Judge if it is determined that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issue at stake in the litigation. The Superior Judge may act upon the Superior Judge's own initiative after reasonable notice or pursuant to a motion under subdivision (e).~~

(1) *Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

(2) *Limitations on Frequency and Extent.*

(A) *Specific Limitations on Electronically Stored Information.* A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(B)(ii). The judge may specify conditions for the discovery.

(B) *Orders Limiting Frequency or Extent of Discovery.* On motion or on its own, the judge must limit the frequency or extent of discovery otherwise allowed by these rules if it determines that:



(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii) the proposed discovery is outside the scope permitted by paragraph (b)(1) of this rule.

(23) Insurance Agreements.

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(34) Trial Preparation: Materials.

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(45) Trial Preparation: Experts.

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(56) Claims of Privilege or Protection of Trial-Preparation Materials.

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(c) **Protective Orders.** Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, any Superior Judge may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place or the allocation of expenses; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the judge; (6) that a deposition after being sealed be opened only by order of the judge; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the judge.

If the motion for a protective order is denied in whole or in part, the judge may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

\* \* \* \* \*

(f) **Discovery Conference.** At any time after commencement of an action the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court shall do so upon motion by the attorney for any party if the motion includes:

- (1) A statement of the issues as they then appear;
- (2) A proposed plan and schedule of discovery, including any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced;
- (3) Any limitations proposed to be placed on discovery;
- (4) Any other proposed orders with respect to discovery; and
- (5) A statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the motion.

Each party and each party's attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party. Notice of the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be filed not later than 15 days after service of the motion.

Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, including any issues about preserving discoverable information, any issues about discovery of electronically stored information including the form or forms in which it should be produced, and any issues about claims of privilege or protection as trial-preparation materials; establishing a plan and schedule for discovery; setting limitations on discovery, if any; and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires.

Subject to the right of a party who properly moves for a discovery conference to prompt convening of the conference, the court may combine the discovery conference with a pretrial conference authorized by Rule 16.

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### **Reporter's Notes—2017 Amendment**

Rule 26 is amended to adapt portions of amendments to F.R.C.P. 26 effective December 1, 2015. See, generally, Federal Advisory Committee's Note to 2015 amendments of F.R.C.P. 26.

New Rule 26(b)(1) incorporates amended F.R.C.P. 26(b)(1) verbatim, significantly redefining the scope of discovery under the former Vermont rule. Discovery must now be relevant to any party's claim or defense, as opposed to being reasonably calculated



to lead to the discovery of admissible evidence. Now, if information is otherwise within the scope of the rule, it “need not be admissible in evidence to be discoverable.” A proportionality requirement has been added, saying that discovery may now only be obtained if it is “proportional to the needs of the case” as defined by five factors. These factors were added to the Federal Rule by 1983 and 1993 amendments that were not adopted for V.R.C.P. 26(b)(1).

New Rule 26(b)(2)(A) is carried forward from present Rule 26(b)(1) to which it was added by a 2009 amendment incorporating what is now F.R.C.P. 26(b)(2)(B). Former Rules 26(b)(2)-(5) are renumbered (3)-(6). Rule 26(c)(2) is amended to adopt the 2015 amendment to F.R.C.P. 26(c)(1)(B), allowing a protective order to address “the allocation of expenses” to eliminate any doubt that an order could include such a provision. See Federal Advisory Committee’s Note to 2015 amendment of F.R.C.P. 26(c)(1)(B). Rule 26(f) is amended to adopt the 2015 amendment adding F.R.C.P. 26(f)(3)(C) to provide that the discovery plan include issues about electronically stored information.

3. That Rule 34(b) of the Vermont Rules of Civil Procedure be amended to read as follows (deleted matter struck through; new matter underlined):

### **RULE 34. PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY UPON LAND FOR INSPECTION AND OTHER PURPOSES**

(b) **Procedure.** The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. The request may specify the form or forms in which electronically stored information is to be produced.

The party upon whom a request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. Any Superior Judge may allow a shorter or longer time. ~~The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, including an objection to the requested form or forms for producing electronically stored information, stating the reasons for objection. For each item or category, the response must either state that inspection and related activities will be permitted as requested or state with specificity the grounds for objecting to the request, including the reasons. An objection must state whether any responsive materials are being withheld on the basis of that objection. If objection is made to part of an item or category, the objection must specify the part shall be specified and permit~~

inspection of the rest. The request being addressed shall be reproduced before the response. If objection is made to the requested form or forms for producing electronically stored information – or if no form was specified in the request – the responding party must state the form or forms it intends to use. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

Unless the parties otherwise agree, or the court otherwise orders:

(i) a party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request;

(ii) if a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable; and

(iii) a party need not produce the same electronically stored information in more than one form.

#### **Reporter's Notes—2017 Amendment**

Rule 34(b) is amended to adapt portions of amendments to F.R.C.P. 34(b)(2) effective December 1, 2015. The amendment requires the grounds for objection to be stated specifically consistent with the requirement that an objection has to state whether materials are being withheld in order to “facilitate an informed discussion of the objection.” Federal Advisory Committee’s Note to 2015 amendments of F.R.C.P. 34(b)(2)(C). A provision in the federal rule permitting a party to produce copies of documents or electronically stored information in lieu of inspection has not been adopted because it permits the party to avoid actual inspection in a situation where actual inspection might be important.

4. That Rule 37(f) of the Vermont Rules of Civil Procedure be amended to read as follows (deleted matter struck through; new matter underlined):

#### **RULE 37. FAILURE TO MAKE DISCOVERY: SANCTIONS**

**(f) Failure to ~~Provide~~ Preserve Electronically Stored Information or Other Evidence.** ~~Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.~~ If electronically stored or other evidence that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court, upon finding prejudice to another party from loss of the evidence, may order measures no greater than necessary to cure the prejudice.



### Reporter's Notes—2017 Amendment

Rule 37(f) is amended to adapt portions of the amendments to F.R.C.P. 37(e) effective December 1, 2015. The amendment is broader than the federal rule, applying not only to electronically stored, but to “other evidence,” that should have been preserved. In view of this greater breadth, the present amendment leaves remedies for intentional nondisclosure covered in F.R.C.P. 37(e)(2) to Vermont case law.

5. That Rule 55(c) of the Vermont Rules of Civil Procedure be amended to read as follows (deleted matter struck through; new matter underlined):

#### RULE 55. DEFAULT

(c) Setting Aside Default or a Default Judgment. ~~For good cause shown the court may set aside an entry of default. If a judgment by default has been entered, the court may set it aside in accordance with Rule 60(b) and not otherwise. The court may set aside an entry of default for good cause, and it may set aside a final default judgment under Rule 60(b).~~

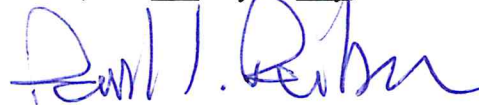
### Reporter's Notes—2017 Amendment

Rule 55(c) is amended to adopt the amendment to F.R.C.P. 55(c) effective December 1, 2015. The federal rule was originally amended in 2007 as part of the general restyling of the Federal Rules. The 2015 amendment inserted “final” in the last clause, to make clear that the standards of Rule 60(b) apply only to a judgment that is “final” because it disposes of all claims among all parties, or because the judge has directed entry of final judgment under Rule 54(b). In the absence of finality, the judgment may be revised at any time under Rule 54(b). See Federal Advisory Committee’s Note to 2015 amendment of F.R.C.P. 55(c).

6. That these rules, as amended, are prescribed and promulgated effective September 18, 2017. The Reporter’s Notes are advisory.

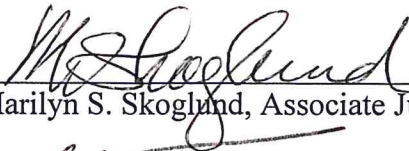
7. That the Chief Justice is authorized to report this amendment to the General Assembly in accordance with the provisions of 12 V.S.A. § 1, as amended.


Dated in Chambers at Montpelier, Vermont, this 14<sup>th</sup> day of July, 2017.

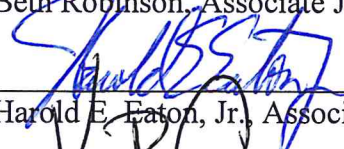


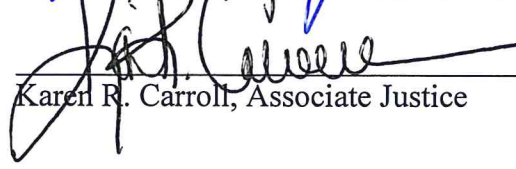
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Paul L. Reiber, Chief Justice

  
Marilyn S. Skoglund, Associate Justice

  
Beth Robinson, Associate Justice

  
Harold E. Eaton, Jr., Associate Justice

  
Karen R. Carroll, Associate Justice